

## INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument	5
Introduction	
I. Construed in light of the obvious congressional intent, the Finality Act cannot be read as having abrogated any of the Commission's enforcement powers	14
A. The construction given to the Finality Act by the court of appeals is inconsistent with Congress' intention to strengthen enforcement of the Clayton Act	14
B. No principle of statutory construction bars an interpretation of the Finality Act which would accord with the plain legislative intent	21
II. The General Savings Statute preserves the remedies by which the pre-1959 order against respondent may be enforced	25
Conclusion	29
Appendices:	
A	30
B	34
C	40
D	41
E	51

## CITATIONS

## Cases:

	Page
<i>Anchor Serum Co.</i> , 50 FTC 681, affirmed, 217 F. 2d 867.	21
<i>Automatic Canteen Co.</i> , 54 FTC 1831.	21
<i>Beltone Hearing Aid Co.</i> , 52 FTC 830.	21
<i>Biddle Purchasing Co. v. Federal Trade Commission</i> (C.A. 2) No. 15624, June 5, 1941, unreported.	7
<i>Cabell v. Markham</i> , 148 F. 2d 733, affirmed, 326 U.S. 494.	23
<i>Callaway Mills Co.</i> , 52 FTC 564.	21
<i>Carter Carburetor Corporation v. Federal Trade Commission</i> , 112 F. 2d 722.	8
<i>Champion Spark Plug Co.</i> , 50 FTC 30.	21
<i>In re Cheff</i> , 341 F. 2d 548, affirmed <i>sub nom. Cheff v. Schnackenberg</i> , 384 U.S. 373.	18
<i>Cheff v. Schnackenberg</i> , 384 U.S. 373.	7
<i>Corn Products Refining Co. v. Federal Trade Commission</i> , 144 F. 2d 211, affirmed, 324 U.S. 726.	8
<i>De La Bama S.S. Co. v. United States</i> , 344 U.S. 386.	28
<i>Dictograph Products, Inc.</i> , 50 FTC 281, affirmed, 217 F. 2d 821, certiorari denied, 349 U.S. 940.	21
<i>Eastern Coal Corp. v. National Labor Relations Board</i> , 176 F. 2d 131.	27
<i>E. Edelmann &amp; Co.</i> , 51 FTC 978, affirmed, 239 F. 2d 152, certiorari denied, 355 U.S. 941.	20
<i>Elizabeth Arden, Inc. v. Federal Trade Commission</i> , 156 F. 2d 132.	8
<i>Federal Trade Commission v. American Crayon Co.</i> , 223 F. 2d 264, certiorari granted and reversed, 356 U.S. 907, 352 U.S. 866.	11
<i>Federal Trade Commission v. Balsme</i> , 23 F. 2d 615, certiorari denied, 277 U.S. 598.	8
<i>Federal Trade Commission v. Baltimore Paint &amp; Color Works</i> , 41 F. 2d 474.	7, 8
<i>Federal Trade Commission v. Benrus Watch Co.</i> (C.A. 2), No. 27752 (1962), unreported.	14
<i>Federal Trade Commission v. Broch and Co.</i> , 368 U.S. 360.	20, 24

## Cases—Continued

Barnitz 3-2283

	Page
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683	8
<i>Federal Trade Commission v. Herzog</i> , 150 F. 2d 450	7, 8
<i>Federal Trade Commission v. Morton Salt Co.</i> , 334 U.S. 37	20
<i>Federal Trade Commission v. Nash-Finch Co.</i> , 228 F. 2d 407	14
<i>Federal Trade Commission v. National Lead Co.</i> , 352 U.S. 419	20
<i>Federal Trade Commission v. Pacific-Gamble-Robinson Co.</i> (C.A. 9) No. 18260 (1962), unreported	14
<i>Federal Trade Commission v. Pacific States Trade Association</i> , 88 F. 2d 1009	7
<i>Federal Trade Commission v. Ruberoid Co.</i> , 343 U.S. 470	8, 10, 11, 19, 20, 25
<i>Federal Trade Commission v. A. E. Staley Mfg. Co.</i> , 324 U.S. 746	8
<i>Federal Trade Commission v. Standard Brands, Inc.</i> , 189 F. 2d 510	11
<i>Federal Trade Commission v. Standard Education Society</i> , 14 F. 2d 947	7, 8
<i>Federal Trade Commission v. Standard Education Society</i> , 86 F. 2d 692, reversed, 302 U.S. 112	8
<i>Federal Trade Commission v. Washington Fish &amp; Oyster Co.</i> , 271 F. 2d 39, 282 F. 2d 595	11
<i>Federal Trade Commission v. Whitney &amp; Co.</i> , 192 F. 2d 746	7
<i>B. F. Goodrich Co.</i> , 50 FTC 138	20
<i>The Great Atlantic &amp; Pacific Tea Co. v. Federal Trade Commission</i> , 106 F. 2d 667	8
<i>Harley-Davidson Motor Co.</i> , 50 FTC 1047	21
<i>In re Holland Furnace Co.</i> , 341 F. 2d 548, certiorari denied, 381 U.S. 924	18
<i>International Paper Company</i> , 53 F.T.C. 1192	21
<i>Johnson v. United States</i> , 163 Fed. 30	22
<i>Judson L. Thomson Mfg. Co. v. Federal Trade Commission</i> , 150 F. 2d 952	8
<i>Leavitt v. Federal Trade Commission</i> (C.A. 2) No. 9037, February 4, 1929 and December 24, 1935	7
<i>Modern Marketing Service v. Federal Trade Commission</i> , 149 F. 2d 970	9

## Cases—Continued

<i>Moog Industries</i> , 51 <i>FTC</i> 931, affirmed, 238 <i>F.2d</i> 43,	Page
rehearing denied, 356 <i>U.S.</i> 905	20
<i>E.B. Muller &amp; Co. v. Federal Trade Commission</i> , 142 <i>F.</i>	
2d 511	8
<i>Nash-Finch Co. v. Federal Trade Commission</i> , 233 <i>F.</i>	
Supp. 910	14
<i>National Labor Relations Board v. Edward G. Budd</i>	
<i>Mfg. Co.</i> , 169 <i>F.2d</i> 571, certiorari denied, 335 <i>U.S.</i>	
908	27
<i>National Labor Relations Board v. Mylan-Sparta Co.</i> ,	
168 <i>F.2d</i> 485	27
<i>National Labor Relations Board v. National Garment Co.</i> ,	
168 <i>F.2d</i> 233, certiorari denied, 334 <i>U.S.</i> 845	
<i>Oliver Bros. v. Federal Trade Commission</i> , 102 <i>F.2d</i>	
763	9
<i>Ozawa v. United States</i> , 260 <i>U.S.</i> 178	
<i>Quality Bakers of America v. Federal Trade Commission</i> ,	
114 <i>F.2d</i> 393	8
<i>Q.R.S. Music Company v. Federal Trade Commission</i> ,	
12 <i>F.2d</i> 730	9
<i>Samuel H. Moss, Inc. v. Federal Trade Commission</i> ,	
148 <i>F.2d</i> 378	8
<i>Schick v. Federal Trade Commission</i> , 288 <i>F.2d</i> 407	
<i>Signode Steel Strapping Co. v. Federal Trade Commission</i> , 132 <i>F.2d</i> 48	
<i>Southgate Brokerage Co. v. Federal Trade Commission</i> ,	
150 <i>F.2d</i> 607	8
<i>Sperry Rand Corp.</i> , 55 <i>FTC</i> 655	
<i>Sperry Rand Corp. v. Federal Trade Commission</i> , 288 <i>F.</i>	
2d 403	14, 23, 24
<i>Sunshine Biscuits, Inc.</i> , 52 <i>FTC</i> 119	
<i>United States v. Hindman</i> , 179 <i>F. Supp.</i> 926	
<i>United States v. Standard Oil Co.</i> , 384 <i>U.S.</i> 224	
<i>Vendo Co.</i> , 54 <i>FTC</i> 253	
<i>Wanderer v. Kaplan</i> , 1962 <i>Trade Cases</i> , 5 70,535	
<i>Webb-Crawford Co. v. Federal Trade Commission</i> , 109	
<i>F.2d</i> 268, certiorari denied, 310 <i>U.S.</i> 638	14
Statutes:	
<i>Act of February 25, 1871</i> :	
Sec. 4, 16 Stat. 432	25
<i>Civil Aeronautics Act</i> , 52 Stat. 1028	6

Statutes—Continued

Clayton Act of 1914:	
Sec. 11, 38 Stat. 734	3, 6, 7
Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959:	
Sec. 2 (15 U.S.C. (1958 ed.) 13)	20
Sec. 2(a) (15 U.S.C. (1958 ed.) 13(a))	20
Sec. 3 (15 U.S.C. (1958 ed.) 13a)	20
Sec. 7 (15 U.S.C. (1958 ed.) 18)	21
Sec. 11 (15 U.S.C. (1958 ed.) 21)	2, 17, 22, 30
Federal Communications Commission Act, 48 Stat. 1102	6
Federal Trade Commission Act, 38 Stat. 719:	
Sec. 5	7, 9, 10
Finality Act of 1959, 73 Stat. 243	2, 3, 5, 16
Sec. 1	34
Sec. 2	13, 24, 28, 39
General Savings Statute, Rev. Stat. 13, as amended, 1 U.S.C. 109	2, 5, 6, 25, 28, 40
Wheeler-Lea Act (amending Federal Trade Commission Act), 52 Stat. 111:	
Sec. 5	14
Sec. 5(a)	9, 28
Congressional material:	
104 Cong. Rec. 13789	12
105 Cong. Rec. 12730, 12733	12, 16
105 Cong. Rec. 12729-12735; 12810-12811; 12974, 13221	13
105 Cong. Rec. 12733	12
Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 85th Cong., 2d Sess.	12
Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 86th Cong., 1st Sess.	13
H.R. 432, 86th Cong., 1st Sess.	12
H.R. 2977, 86th Cong., 1st Sess.	12
H.R. 6049, 85th Cong. 1st Sess.	12
H.R. 8682, 85th Cong., 2d Sess.	12
H.R. 10199, 85th Cong., 2d Sess.	12
H.R. 13530, 85th Cong., 2d Sess.	12
H.R. 3402, 81st Cong., 1st Sess.	11
H.R. 6748, 84th Cong., 1st Sess.	11

Congressional material—Continued

	Page
H. Rep. No. 580, 86th Cong., 1st Sess.	13
President's economic messages to Congress, 1956, 1957, 1958, 1959	12
S. 714, 86th Cong., 1st Sess.	12
S. 726, 86th Cong., 2d Sess.	12
S. 721, 85th Cong., 2d Sess.	12
S. 2205, 84th Cong., 1st Sess.	11
S. Rep. 1808, 85th Cong., 2d Sess.	12
S. Rep. No. 83, 86th Cong., 1st Sess.	13, 15, 16

Miscellaneous:

3 CCH Trade Reg. Rep. ¶ 9711.40 (1965)	19
16 C.F.R. 3.1 et seq.	19
1946 Federal Trade Commission Annual Report	12
1947 Federal Trade Commission Annual Report	13
1948 Federal Trade Commission Annual Report	12
1951 Federal Trade Commission Annual Report 7-8	11
1952 Federal Trade Commission Annual Report 3	11
1958 Federal Trade Commission Annual Report 7	11
Ruud, <i>The Savings Clause—Some Problems in Constructing and Drafting</i> , 33 Tex. L. Rev. 285, 286 (1955)	26
Schniderman, <i>Federal Trade Commission Orders under the Robinson-Patman Act</i> , 65 Harv. L. Rev. 750, 772 (1952)	18
Simon, <i>The Retroactivity of Amended Section II of the Clayton Act</i> , 1960 Antitrust Law Symposium, New York State Bar Association, CCH Trade Reg. Rep. No. 153, June 8, 1960, pp. 85-86	10

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v. JANTZEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 76-87) is reported at 356 F. 2d 253. The opinion of the Federal Trade Commission (R. 40-43) is not yet reported.

JURISDICTION

The order of the court of appeals (R. 87) was entered on February 4, 1966. On May 5, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 1, 1966. The petition for a writ of certiorari was filed on July 1, 1966, and was granted on October 10, 1966 (R. 88). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Finality Act of 1959, which amended the procedure for review and enforcement of Clayton Act cease-and-desist orders, repealed the authority of the Federal Trade Commission to seek, and the jurisdiction of the courts of appeal to grant, affirmance and enforcement of Commission orders issued prior to the amendment.

## STATUTES INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959, 15 U.S.C. (1958 ed.) 21, the Finality Act of 1959, 73 Stat. 243, and the General Savings Statute, Rev. Stat. 13, as amended, 1 U.S.C. 109, are set out in Appendices A-C, pp. 30-40, *infra*.

## STATEMENT

Respondent manufactures men's, women's and children's apparel which are distributed to some 12,000 retail outlets located throughout the world (R. 15-16). On September 4, 1958, respondent was charged by the Federal Trade Commission with having violated Section 2(d) of the Clayton Act by granting discriminatory advertising and promotional allowances to certain favored customers (R. 1-3). Respondent did not answer the complaint, but consented to the entry against it of a cease-and-desist order prohibiting further discrimination in advertising and promotional allowances (R. 4-6). The agreement and order were approved by a hearing examiner (R. 6-8), and on

January 16, 1959, the order was adopted by the Commission (R. 9; 55 F.T.C. 1065).<sup>1</sup>

On July 23, 1959, the Finality Act of 1959, 73 Stat. 243, became effective.<sup>2</sup> On July 22, 1964, the Commission ordered an investigational hearing into charges that respondent had violated the 1959 consent order by granting discriminatory advertising and promotional allowances (R. 11-12). Respondent stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tennessee, and in Brooklyn, New York, and that the payments to these and "other favored customers" had not been made available on proportionally equal terms to all its other customers competing in the distribution of Jantzen products, as required by the cease-and-desist order (R. 18-19). The hearing examiner issued his report and certification to the Commission (R. 15-20). On April 12, 1965, after considering the entire record including the admissions in the stipulation, the Commission concluded that respondent's acts and practices violated the order (R. 40-43).

On April 22, 1965, the Commission applied, under the provisions of the third paragraph of Section 11 of the original Clayton Act, to the Court of Appeals for the Ninth Circuit to affirm and enforce the cease-and-desist order (R. 68). The court of appeals sustained respondent's contention that the Commission's

<sup>1</sup> An inadvertent error in terminology appearing in the Commission's decision and order was subsequently corrected on joint motion of the parties (R. 10).

<sup>2</sup> For a full discussion of the changes made by this Act, see pp. 6-14, *infra*.

petition should be dismissed for lack of jurisdiction (R. 87). The court held that the 1959 amendment repealed the authority of the Commission to seek, and of the courts to grant, affirmance and enforcement of cease-and-desist orders entered by the Commission before its effective date (R. 81).

#### ~~SUMMARY OF ARGUMENT~~

1. The court below held that by amending Clayton Act enforcement procedures in 1959, Congress withdrew from the Federal Trade Commission the authority to seek enforcement of orders entered prior to 1959 and abrogated the jurisdiction of the courts of appeal to affirm and enforce such orders at the Commission's request. That conclusion conflicts squarely with the plain intention of the Congress which enacted the statute, for it was Congress' purpose to strengthen enforcement of the Clayton Act and not to deprive any agency or court of the powers which it had previously possessed.

The authority given the Commission by the 1959 Act to issue orders which are enforceable under its streamlined procedures is not co-extensive with the power the Commission had before 1959 to obtain court enforcement of a Clayton Act order which had been violated. Congress could not, therefore, have believed that the abrogation of authority read into the statute by the court below would have achieved its purpose of strengthening Clayton Act enforcement. For the threat of an ultimate contempt sanction, which the pre-1959 procedure provided, effectively restrains respondents who might, absent such

5

a possibility, violate the terms of a Commission order. And since an order may permissibly restrain lawful conduct which is related to a violation of the Clayton Act, the Commission possesses authority under the pre-1959 procedures with respect to pre-1959 orders which it does not have if it must start afresh.

The court below relied heavily on the formalistic principle that a substitution of remedial provisions in a statute effectuates an immediate repeal of the earlier remedies. We submit that the amending language can be construed consistently with the overriding statutory purpose as prescribing new remedies for new orders and as leaving the pre-existing remedies in effect with respect to pre-1959 orders.

2. Even if the legislative purpose were not as clear as it is, the General Savings Statute, 1 U.S.C. 109, would bar the abrogation of the pre-1959 remedies absent an express provision to that effect in the Finality Act. The savings statute preserves any "liability incurred" under a repealed statute. Prior to 1959 respondent had incurred a "liability," and the proceeding brought in the court below to enforce the Commission's order was an "action or prosecution for the enforcement of such . . . liability".

#### **ARGUMENT**

##### **INTRODUCTION**

The court below held that a consequence of the enactment of the Finality Act of 1959 was to render unenforceable orders such as the one against respondent—issued before the effective date of the amendment and not pending in the courts on that date. Our conten-

tion that this conclusion was erroneous is based *first* on the plain intention of Congress in enacting the 1959 legislation, and *second* on the terms of the General Savings Statute, 1 U.S.C. 109, which preserves liabilities incurred before the statute was amended. Before discussing these contentions in detail, however, we review briefly the background and history of the Finality Act of 1959 in order to place the amendment in proper perspective.

The Clayton Act of 1914, 38 Stat. 730, 734, vested jurisdiction to enforce various of its provisions in three administrative agencies: the Interstate Commerce Commission, the Federal Reserve Board and the Federal Trade Commission.<sup>1</sup> The agencies were empowered by Section 11 of the Act to issue complaints, to conduct hearings, and, upon making appropriate findings, to order respondents "to cease and desist from the violations."

The third paragraph of Section 11 authorized the agency, if a respondent "fails or neglects to obey such order of the Commission or Board while the same is in effect," to apply to a court of appeals "for the enforcement of its order." The court to which such application would be made was empowered "to make and enter a decree affirming, modifying, or setting aside" the agency order. See pp. 31-32, *infra*.

Section 11 was silent on the subject of the record which was required to support a finding that an agency order had been disobeyed. Although the statute did not spell out the sanction for violation of

<sup>1</sup> The Federal Communications Commission and the Civil Aeronautics Board were subsequently granted jurisdiction in their regulatory areas. 48 Stat. 1102; 52 Stat. 1025.

7

the reviewing court's enforcement decree, it was universally assumed that such violations were punishable as contempt.\*

The fourth paragraph of Section 11 granted to respondents against whom orders had been entered the right to petition, at any time, to a court of appeals to have the order set aside. The court in which such a petition was filed was accorded the same jurisdiction to "affirm, set aside, or modify" the agency order as it had in agency enforcement proceedings.

Section 5 of the Federal Trade Commission Act of 1914, 38 Stat. 719, provided, in similar terms, for identical procedures to be followed in Commission cases involving unfair methods of competition.

Under these two statutes, the Federal Trade Commission and the courts of appeal developed various procedures for the enforcement of cease-and-desist orders. Some courts required the Commission to establish, before it could obtain enforcement, that its order had been violated. Some of these courts granted the Commission's applications for "affirm-

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\* Cf. *Cheff v. Schnackenberg*, 384 U.S. 373; *Federal Trade Commission v. Pacific States Trade Association*, 88 F. 2d 1009 (C.A. 9); *Biddle Purchasing Co. v. Federal Trade Commission*, (C.A. 2), No. 15624, June 5, 1941; *Leavitt v. Federal Trade Commission*, (C.A. 2), No. 9037, February 4, 1929 and December 24, 1935. All these cases, other than *Biddle*, concerned Section 5 orders rather than Clayton Act orders, but the governing principle is the same in both situations.

\* E.g., *Federal Trade Commission v. Herzog*, 150 F. 2d 450 (C.A. 2) (Clayton Act); *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474 (C.A. 4); *Federal Trade Commission v. Standard Education Society*, 14 F. 2d 947 (C.A. 7) (F.T.C.A.); *Federal Trade Commission v. Whitney & Co.*, 192 F. 2d 746 (C.A. 9).

ance" but then referred the issue of disobedience to the Commission as a special master and entered their own enforcement orders only if disobedience was found.<sup>1</sup> One court of appeals required proof of disobedience before it would even consider the validity of the order.<sup>2</sup> Prior to this Court's decision in *Federal Trade Commission v. Huberoid Co.*, 343 U.S. 470, many courts did not require a preliminary showing of disobedience as a condition of enforcement when a respondent sought review. If, on the respondent's petition for review, the courts affirmed, they would also enforce the order whether or not the Commission had cross-petitioned for enforcement.<sup>3</sup>

<sup>1</sup> *Federal Trade Commission v. Herzog*, *supra*; *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692 (C.A. 2), reversed, 302 U.S. 112; *Federal Trade Commission v. Balm's*, 23 F. 2d 615 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission v. Baltimore Paint & Color Works*, 41 F. 2d 474 (C.A. 4).

<sup>2</sup> *Federal Trade Commission v. Standard Education Society*, 14 F. 2d 947 (C.A. 7).

<sup>3</sup> Cross-petition filed: *Federal Trade Commission v. Cement Institute*, 333 U.S. 688, 730; *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1); *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378, 380 (C.A. 2); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 8); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 520 (C.A. 6); *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 311, 321 (C.A. 7), affirmed, 324 U.S. 726; *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8). No cross-petition filed: *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 760; *Judson L. Thomson Mfg. Co. v. Federal Trade Commission*, 150 F. 2d 952 (C.A. 1); *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 182, 185 (C.A. 2); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 807 (C.A. 4); *Signode Steel Strapping Co. v. Federal Trade Commission*, 139

The confusion caused by the varied procedures and the general clumsiness of the remedy made it apparent, by 1938, that simpler and more efficient enforcement procedures would aid the Commission's task. The Wheeler-Lea Amendment to the Federal Trade Commission Act, 52 Stat. 111, clarified the jurisdiction of the Commission and streamlined the enforcement procedures under Section 5 of that Act. Orders issued under Section 5 were, by reason of the Wheeler-Lea Amendment, to become final sixty days after their issuance or upon affirmance by a court of appeals in which a petition for review had been filed by a respondent. The courts were expressly directed to decree enforcement whenever they affirmed an order of the Commission, and a violation of a final order was made punishable in a district court by a civil penalty of \$5,000.

Section 5(a) of the Wheeler-Lea Act provided that outstanding orders of the Commission which were in effect on the date of the enactment would become final sixty days after that date or upon affirmance in review proceedings instituted during that 60-day period. In other words, respondents against whom orders were outstanding were subjected to the new procedures as of the date of the Wheeler-Lea Act.

These provisions applied, of course, only to pro-

F. 2d 48, 54 (C.A. 4); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 771 (C.A. 4); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268 (C.A. 5), certiorari denied, 310 U.S. 638; *Modern Marketing Service v. Federal Trade Commission*, 149 F. 2d 970, 980 (C.A. 7); *Q.H.S. Music Company v. Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7).

ceedings under Section 5. No similar proposals relating to Clayton Act orders were proposed or were before Congress when the Wheeler-Lea Act was passed.

The Commission was subsequently interested in having the same streamlined procedures made available for Clayton Act enforcement,\* but the decisions which had permitted courts of appeal to grant enforcement in a respondent's review proceeding (note 8, *supra*) obviated some of the immediate need for amendatory legislation. In 1952, however, this Court held in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, that the Commission was not entitled to a decree of enforcement unless it established that a violation of its order had occurred or was imminent. It thereupon became clear that sanctions could be invoked against a Clayton Act violator only on his third violation; The Commission would have to establish that the respondent had violated the Act so as to issue an order. It would then have to prove a violation of the order to obtain a decree of enforcement from the court of appeals. And it would finally have to prove that the respondent committed a third violation to hold him in contempt of the enforcement decree. For the purpose of establishing that its order had been violated and that enforcement was appropriate, the Commission began to conduct post-order evi-

\* Simon, *The Retroactivity of Amended Section II of the Clayton Act*, 1960 Antitrust Law Symposium, New York State Bar Association, CCH Trade Reg. Rep. No. 153, June 8, 1960, pp. 85-86.

dentiary proceedings on the question of disobedience before petitioning a court for enforcement.<sup>10</sup>

Several years before the *Ruberoid* decision, in 1946, the Commission first formally requested Congress to adapt the Wheeler-Lea procedures to Clayton Act cases.<sup>11</sup> The request was repeated in subsequent reports of the agency.<sup>12</sup> A bill to achieve this result was first introduced in the House in 1949.<sup>13</sup> It would have amended Section 11 to conform with the Wheeler-Lea procedures, and it would also have made the new procedure applicable to outstanding orders. No action was taken on the bill, however, and no further legislation was introduced for several years. In 1955, after the *Ruberoid* decision, various proposals to amend Section 11 were introduced. A House bill<sup>14</sup> followed the earlier proposed legislation and made the same provision for outstanding orders. Senator Sparkman introduced legislation in the Senate which did not, however, contain the Wheeler-Lea clause governing outstanding orders.<sup>15</sup> Instead, the Senate

<sup>10</sup> See *Federal Trade Commission v. Standard Brands, Inc.*, 189 F. 2d 510 (C.A. 2); *Federal Trade Commission v. American Crayon Co.*, 223 F. 2d 284 (C.A. 6), reversed, 350 U.S. 907, 352 U.S. 806; *Federal Trade Commission v. Washington Fish & Oyster Co.*, 271 F. 2d 39 (C.A. 9), 282 F. 2d 595 (C.A. 9).

<sup>11</sup> 1946 Federal Trade Commission Annual Report 12.

<sup>12</sup> 1947 Federal Trade Commission Annual Report 13; 1948 Federal Trade Commission Annual Report 12; 1951 Federal Trade Commission Annual Report 7-8; 1952 Federal Trade Commission Annual Report 3; 1958 Federal Trade Commission Annual Report 7.

<sup>13</sup> H.R. 3402, 81st Cong., 1st Sess.

<sup>14</sup> H.R. 6745, 84th Cong., 1st Sess.

<sup>15</sup> S. 2205, 84th Cong., 1st Sess.

legislation made explicit provision only for orders which were being reviewed at the time of the legislation's effective date. Neither the House nor Senate bill was reported out of committee.

At the opening of the 85th Congress, Senator Sparkman again introduced his bill,<sup>18</sup> and Congressman Roosevelt presented the House version in that chamber.<sup>19</sup> After hearings,<sup>20</sup> the Sparkman bill was favorably reported by the Senate Judiciary Committee.<sup>21</sup> Congressman Roosevelt then introduced the Sparkman bill in the House.<sup>22</sup> In the meantime, the Senate passed the reported bill without debate. 104 Cong. Rec. 13789. The House, however, took no action on any of the proposals before it.

The President's economic messages to Congress for 1956, 1957, 1958 and 1959 also recommended amendatory legislation to expedite enforcement of Clayton Act orders (105 Cong. Rec. 12730, 12733), and the 86th Congress finally made the requested change in 1959. In that Congress Senator Sparkman introduced S. 726, a copy of the bill previously passed by the Senate. Four other similar bills were also introduced.<sup>23</sup> Without dissent, and with only brief discus-

<sup>18</sup> S. 721, 85th Cong., 2d Sess.

<sup>19</sup> H.R. 8682, 85th Cong., 2d Sess., see also H.R. 10199, 85th Cong., 2d Sess.

<sup>20</sup> *Legislation affecting Sections 7, 11 and 15 of the Clayton Act*. Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 85th Cong., 2d Sess.

<sup>21</sup> S. Rep. No. 1808, 85th Cong., 2d Sess.

<sup>22</sup> H.R. 13530, 85th Cong., 2d Sess.

<sup>23</sup> S. 714, H.R. 432, H.R. 2977, and H.R. 6049, 86th Cong., 1st Sess.

105 Cong. Rec. 12729-12735; 12810-12811; 12974, 13221. Imrebo' 1911 to 6 hours of instruction at 800 per.

The effect of the amendment on outstanding Clayton Act orders was not discussed and no explanation was offered for the differences between the versions introduced in the House and Senate during the 84th and 85th Congresses. The enacted legislation, which became effective on July 23, 1959, made no express provision for outstanding orders other than those pending in the courts or previously reviewed. Section 2 of the Finality Act provided (p. 39, *infra*):

The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton Act] \* \* \*. Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

Of the 440 outstanding enforceable Clayton Act orders in effect on July 23, 1959, 50 had been affirmed or enforced by appellate courts and 11 were pending in judicial review proceedings. (See Appendix D, pp. 41-49, *infra*). Consequently, 379 such orders were not explicitly covered in the amendment. The Commission initially took the position that, notwithstanding the Congress' failure to include the Wheeler-Lea

" The Senate held no additional hearings. Its Judiciary Committee simply submitted a brief report endorsing the legislation. S. Rept. No. 83, 86th Cong., 1st Sess., pp. 50-55, *infra*. The House conducted brief hearings (*Finality of Clayton Act Orders*, Hearings before the Anti-trust Subcommittee of the House Judiciary Committee, 86th Cong., 1st Sess.) then reported the bill favorably. H. Rep. No. 580, 86th Cong., 1st Sess.

clause in the statute, the new procedure would apply to outstanding orders in the same manner as under the 1938 amendment to Section 5 of the Federal Trade Commission Act—i.e., that such orders would become final 60 days after the effective date of the 1959 statute unless petitions to review were filed within that period. See *supra*, p. 9.

The Court of Appeals for the District of Columbia Circuit held in 1961, however, that the amended procedure did not apply to unreviewed pre-Finality Act orders. *Sperry Rand Corp. v. Federal Trade Commission*, 288 F. 2d 403; *Schick v. Federal Trade Commission*, 288 F. 2d 407; *Federal Trade Commission v. Nash-Finch Co.*, 288 F. 2d 407. Since these decisions the Commission has successfully invoked the pre-1959 procedure when it has found that a pre-Finality Act order has been violated.<sup>22</sup> This is the first case in which a respondent has contended that the effect of the 1959 Act was to abrogate the pre-existing enforcement procedures applicable to pre-1959 orders.

**CONSTRUED IN LIGHT OF THE OBVIOUS CONGRESSIONAL INTENT, THE FINALITY ACT CANNOT BE READ AS HAVING ABROGATED ANY OF THE COMMISSION'S ENFORCEMENT POWERS**

**A. THE CONSTRUCTION GIVEN TO THE FINALITY ACT BY THE COURT OF APPEALS IS INCONSISTENT WITH CONGRESS' INTENTION TO STRENGTHEN ENFORCEMENT OF THE CLAYTON ACT.**

<sup>22</sup> *Federal Trade Commission v. Pacific-Gamble-Robinson Co.*, No. 18260 (C.A. 9, 1962); *Federal Trade Commission v. Ben-*

1. The Finality Act of 1959 was enacted, according to the Senate Committee Report which accompanied the bill to the floor of that chamber, to "put teeth into Clayton Act orders and \* \* \* [to] fill the enforcement void which has existed for many years." S. Rep. No. 83, 86th Cong., 1st Sess. (1959), p. 2; Appendix E, p. 53, *infra*.

The legislation's sponsors contemplated that the Act would "strengthen the enforcement provisions of section 11 of the Clayton Act" (*id.* at 3; p. 55, *infra*), by substituting new remedies for the then-existing procedures which were characterized as "laborious, time consuming, and very expensive" (*id.* at 2; p. 52, *infra*). The sponsors made it entirely clear, however, that the new legislation was not intended to cut back on the powers of the Commission to enforce the Clayton Act. Senator Sparkman, the bill's principal supporter, stated that "the bill in nowise proposes any deviation from the original intent of Congress when it enacted the Clayton Act and the Federal Trade Commission Act. \* \* \* The bill \* \* \* is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act." 105 Cong.

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*rus Watch Co.*, No. 27752 (C.A. 2, 1962). See also *Wanderer v. Kaplan*, 1962 Trade Cases, § 70,535; *Nash-Finch Co. v. Federal Trade Commission*, 233 F. Supp. 910 (D. Minn.).

Rec. 12732-12733. The remarks of Congressman Celler, Chairman of the House Judiciary Committee, of Congressman Roosevelt, and of other supporters of the bill, were to the same effect. 105 Cong. Rec. 12730-12733. No contrary views were expressed in either house.

The Finality Act's caption in the Statutes at Large makes this overriding purpose entirely clear. It is there described as an act "[t]o amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder." 73 Stat. 243. And the background of the legislation, which we have summarized at pp. 6-13, *supra*, demonstrates convincingly that it was designed to assist the Federal Trade Commission and not to deprive it of any enforcement powers it possessed.

The Act did not, of course, provide explicitly for the 379 then-outstanding orders which had never been reviewed in courts of appeals and which, because of the absence of any limitations provision in Section 11 of the 1914 Act, were still subject to judicial review. But Congress was plainly aware that such orders existed; the Senate report referred expressly to the "more than 80 outstanding Clayton Act cease-and-desist orders" which were then "under active study at the Commission to determine whether or not respondents are in compliance." S. Rep. No. 83, 86th Cong., 1st Sess. (1959), p. 2, p. 58, *infra*. We submit that by remaining silent with regard to these orders Congress did not intend to deprive them of any mean-

ingful effect. It intended, rather, to retain the pre-existing procedures for their enforcement.<sup>\*\*</sup>

2. The court of appeals in this case held that by amending Section 11 Congress had withdrawn from the Commission the power to obtain judicial enforcement of a pre-1959 order. While finding no indication in the legislative history of any intention to accomplish this result, the court below speculated that Congress may have believed that it was preferable to make the pre-1959 orders judicially unenforceable "than to perpetuate the old system as to old orders" (R. 86). We submit that such a belief would, on its face, have been so plainly inconsistent with the "strengthening" purpose of the Act that, if it had existed, it would have been expressed in the committee reports or on the floor of Congress.

To be sure, the old procedure was unwieldy. The Commission was eager to replace it with a more workable scheme, and Congress apparently was willing to accede to the Commission's request. But the result reached by the court below would not provide a sub-

<sup>\*\*</sup> The fact that Congress enacted the Senate version of the proposed version of the Finality Act rather than the House version (which would have included a provision regarding existing orders similar to the one in the 1938 Wheeler-Lea Act, see pp. 11-12, *supra*) is not evidence of an intent to discard the pre-1959 orders. The only choice Congress was given was whether to establish a 60-day period, as the 1938 amendment did, in which outstanding orders could either be reviewed or would become final or to remain silent as to these orders. No proposed bill explicitly "saved" the pre-1959 remedy for pre-1959 orders. Hence, to the extent Congress rejected anything, it rejected only the kind of provision included in the Wheeler-Lea Act.

stitute for the old procedure; it would simply eliminate it altogether.

3. Nor is the pre-1959 procedure so totally useless that nothing is lost if all enforcement of pre-1959 orders is totally discarded. In having the power to obtain enforcement in the court of appeals, the Commission could wield the threat of contempt. Direct judicial enforcement is a meaningful remedy because a contempt sanction may fall heavily upon a corporation and its officers. See, e.g., *In re Holland Furnace Co.*, 341 F. 2d 548 (C.A. 7), certiorari denied, 381 U.S. 924; *In re Cheff*, 341 F. 2d 548 (C.A. 7), affirmed *sub nom. Cheff v. Schnackenberg*, 384 U.S. 373.

Even though the contempt sanction is no more than a future possibility which applies, under the pre-1959 procedure, only to a third violation of the Act, it is an effective psychological deterrent. Commentators have observed that Clayton Act orders enforceable under the pre-1959 procedures did have a restraining effect upon businesses subject to such orders.<sup>22</sup> Indeed, the mere fact that petitions for review of 82 such orders were filed between 1914 and 1959 is proof enough that

<sup>22</sup> See, e.g., Schinderman, *Federal Trade Commission Orders under the Robinson-Patman Act*, 65 Harv. L. Rev. 750, 772 (1952): "Actual observation of companies operating under such orders \*\*\* discloses that the fear of incurring enforcement proceedings or a contempt citation works a substantial reorientation in the pricing habits of a respondent. Since F.T.C. orders are not automatically final, it has been argued that there may be some difference between the degree of care exercised by a company which had not been placed under a court enforcement order and one which has, but cautious pricing policies are characteristic of both."

respondents did not consider the orders to be mere nullities.<sup>28</sup>

4. The court below apparently believed that the Commission could achieve the same result as it is seeking here by treating violations of pre-1959 orders as new violations of the Act and issuing cease-and-desist orders which would be enforceable in accordance with the Finality Act (R. 86). This overlooks the fact that there is a critical difference between the proof needed to establish an initial violation of the statute and what must be shown to prove that an *order* has been violated.

The statute declares a generalized liability which the Commission applies in full-scale administrative proceedings (16 C.F.R. 3.1 *et seq.*) to the facts of a particular case. Orders resulting from such proceedings define a particularized liability tailored by the Commission to remedy a particular respondent's misconduct. They are not simply prohibitions of the acts which led to the original offense; they may also condemn otherwise lawful practices by which the prohibited goal might be attained. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473; Fed-

<sup>28</sup> The contempt sanction has been retained for certain cases under the Finality Act. If a respondent petitions for review and the court of appeals affirms the Commission's orders, the court "shall issue its own order commanding obedience" to the agency order (p. 36, *infra*). If the order has not been previously affirmed and it is violated, the government may, in addition to seeking civil penalties in the district court, obtain an injunction against further violations. See *United States v. Hindman* 179 F. Supp. 926 (D.N.J.), and ten other unreported cases—all involving orders under the Federal Trade Commission Act—listed at 3 CCH Trade Reg. Rep. ¶ 9711.40 (1965).

*Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 430-431; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 51-53; cf. *Federal Trade Commission v. Broch & Co.*, 368 U.S. 360, 366. Consequently, when the Commission seeks to prove that an order was violated, its proof need not establish a violation of the statute.

For example, orders remedying price discrimination under Section 2 of the Clayton Act are construed to encompass the statutory-cost justification and meeting-competition defenses.<sup>7</sup> But the Commission need not always overcome these defenses a second time in its enforcement proceeding, because the record concerning them in the original proceeding may be adequate. See *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. at 476-477. Moreover, the Commission may not have to prove—as it would in an original proceeding—that the respondent's conduct injured competition. See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 54. Typical orders under Section 2(a) entered since 1948 have flatly prohibited further price discriminations, without requiring additional proof of injury to competition.<sup>8</sup> Orders under Section 3, which prohibits ex-

<sup>7</sup> *Federal Trade Commission v. Broch & Co.*, *supra* at p. 367; *Federal Trade Commission v. National Lead Co.*, *supra* at p. 426; *Federal Trade Commission v. Ruberoid Co.*, *supra* at p. 475-476.

<sup>8</sup> See, e.g., *Moog Industries*, 51 FTC 931 (1955), affirmed, 288 F. 2d 43 (C.A. 8), 355 U.S. 411; *E. Edelmann & Co.*, 51 FTC 978 (1955), affirmed, 289 F. 2d 152 (C.A. 7), certiorari denied, 355 U.S. 941; *B. F. Goodrich Co.*, 50 FTC 138 (1955); *Sunshine Biscuits, Inc.*, 52 FTC 10 (1955); *Sperry Rand Corp.*, 55 FTC 655 (1958).

clusive dealing arrangements, typically prohibit any arrangement barring customers from dealing in competitors' products.<sup>29</sup> And orders in merger cases (Section 7) may bar specific types of acquisitions for a specified period.<sup>30</sup>

We emphasize that the question on which the issue presented here turns is not how substantially the Commission's enforcement power is affected by depriving it of pre-1959 remedies for pre-1959 orders; the question is rather whether there is enough of a difference to render it improbable that Congress would have wished this result. We submit that Congress would not have voluntarily chosen to deprive the Commission of either the psychological force which an enforceable pre-1959 order had or the reduced burden which rested on the Commission in enforcing orders rather than statutes. And it is surely fair to infer that if Congress had so intended, the legislative history of the Finality Act would contain some explicit reference to that purpose.

**B. NO PRINCIPLE OF STATUTORY CONSTRUCTION BARS AN INTERPRETATION OF THE FINALITY ACT WHICH WOULD ACCORD WITH THE PLAIN LEGISLATIVE INTENT.**

The court of appeals also erred in relying on the

<sup>29</sup> *Dictograph Products, Inc.*, 50 FTC 281 (1953), affirmed, 217 F. 2d 821 (C.A. 2); certiorari denied, 349 U.S. 940; *Anchor Serum Co.*, 50 FTC 681 (1954), affirmed, 217 F. 2d 867 (C.A. 7); *Beltone Hearing Aid Co.*, 52 FTC 830 (1956); *Callaway Mills Co.*, 52 FTC 564 (1955); *Harley-Davidson Motor Co.*, 50 FTC 1047 (1954); *Champion Spark Plug Co.*, 50 FTC 30 (1953).

<sup>30</sup> *International Paper Company*, 53 FTC 1192 (1957); *Vendo Co.*, 54 FTC 253 (1957); *Automatic Canteen Co.*, 43 FTC 1831 (1958).

proposition that the "normal rule" of statutory construction is to read a substituting amendment as an immediate repeal of that part of the prior statute for which it is substituted (R. 78-79). While it is true that the Finality Act substituted new procedures for those governing judicial review under the former Section 11 of the Clayton Act, it did not explicitly deny the Commission the power to proceed with respect to existing orders in accordance with authority previously conferred. The language which accomplished the substitution of procedures is "[t]he third, fourth, fifth, sixth, and seventh paragraphs of [section 11 of the Clayton Act] are amended to read as follows: \* \* \*" (p. 35, *infra*). The critical words here—"are amended to read as follows"—must themselves be construed, like the remaining terms of the statute, in light of "common sense, precedent, and legislative history." *United States v. Standard Oil Co.*, 384 U.S. 224, 225. These standards all support a reading of the amendment which would give its substitution of remedies prospective effect only and would preserve the pre-existing procedures for enforcement of pre-1959 orders.

The highly formalistic approach taken by the court below is inconsistent with established modern principles of statutory construction. More than half a century ago, Mr. Justice Holmes, sitting on circuit, said in *Johnson v. United States*, 163 Fed. 30, 32 (C.A. 1):

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will

should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

And in *Cabell v. Markham*, 148 F. 2d 737, 739, (C.A. 2), affirmed, 326 U.S. 494, the late Judge Learned Hand observed:

[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

The interpretation which the court of appeals placed on the amending terms of the Finality Act of 1959 is "plainly at variance with the policy of the legislation as a whole" (*Ozawa v. United States*, 260 U.S. 178, 194) for it weakens, rather than strengthens, enforcement of the Clayton Act.

The Finality Act does not, on its face, lend any support to the court of appeals' doctrinaire reading. That much appears from decisions of this Court and the Court of Appeals for the District of Columbia Circuit, both of which assumed, on having occasion incidentally to consider the precise question in the course of resolving related issues, that the pre-1959 procedure would apply to pre-1959 orders. In *Sperry Rand Corp. v. Federal Trade Commission*, 288 F. 2d

403, the District of Columbia Circuit held that the new finality provisions did not apply to pre-amendment orders, noting that "[e]nforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered." 288 F. 2d at 406. And in *Federal Trade Commission v. Brock & Co.*, 368 U.S. 360, this Court observed, with respect to a pre-1959 order, that the only sanction available was that flowing from "violation of an enforcement order yet to be entered by an appropriate Court of Appeals" \* \* \*<sup>11</sup> 368 U.S. at 365.<sup>11</sup>

Moreover, a sensible construction of the statute, which would give due recognition to the principle that it ought not to be construed so as to ascribe arbitrary motives to the legislators, would compel the opposite result from that reached by the court below. For under Section 2 of the Finality Act, orders as to which review proceedings have been initiated prior to the date of enactment apparently may still be enforced by the pre-1959 procedures, whereas, in the court of appeals' view, orders which had never been appealed may not be so enforced. The firm which in good faith sought review of an order prior to July 23, 1959, would be subject to sanctions for violating that order; but other firms which had not sought

<sup>11</sup> This Court did not advert to the circumstance, on which the court below relied (R. 84), that "the *Brock* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act" so as to fall within the exception provided by Section 2 of the Finality Act. That was not, we submit, the basis of this Court's observation in *Brock*.

review would be free to violate the orders against them with impunity. "There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 479. It would be unreasonable to ascribe to Congress a wish to make this arbitrary distinction.

## II

### THE GENERAL SAVINGS STATUTE PRESERVES THE REMEDIES BY WHICH THE PRE-1959 ORDER AGAINST RESPONDENT MAY BE ENFORCED

Even if the amending language of the Finality Act retroactively repealed the pre-existing jurisdictional provision, the General Savings Statute (Rev. Stat. 13, 1 U.S.C. 109) would preserve the authority of the courts to enforce pre-Finality Act orders on the petition of the Commission. The savings statute—enacted in 1871 (16 Stat. 432)—provides (p. 40, *infra*) that "[t]he repeal of any statute shall not have the effect to release or extinguish any liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such liability". Its obvious purpose was to safeguard against the inadvertent extinction of liabilities incurred under statutes which Congress found it necessary to amend. It is "a conservator; its office is to make the transi-

tion from one set of laws to another less painful and disrupting." Ruud, *The Savings Clause—Some Problems in Constructing and Drafting*, 33 Tex. L. Rev. 285, 286 (1955).

The construction of the Finality Act which the court of appeals adopted would violate the General Savings Statute by extinguishing either or both of two liabilities:

*First*, a liability was "incurred" by respondent, within the meaning of the savings statute, in 1958, when it engaged in the conduct which gave rise to the Commission's complaint against it. Under the then applicable law, respondent thereupon became liable to the entry of a cease-and-desist order which, if violated, would justify the entry of a judicial enforcement decree. The actual entry of the consent order in 1959 was part of the remedy prescribed by law for the enforcement of that liability. A second stage of that remedy—albeit a contingent one—was the issuance of an enforcement order by a court of appeals if respondent engaged in conduct violative of the agency's order. The savings statute, we submit, preserved both halves of this remedy; by seeking enforcement in 1965 the Commission was pursuing a "proper action or prosecution for the enforcement" of the initial "liability." If, on the other hand, the 1959 order were held unenforceable, that liability would effectively have been "release[d] or extinguish[ed]" within the meaning of the savings statute.

*Second*, the 1959 consent order itself constituted a "liability" incurred before the Finality Act was passed. Courts have held in several Labor Board

cases that an administrative cease-and-desist order is a "liability" within the meaning of the statute even though there is no sanction for violation of the order until it has been judicially enforced.<sup>22</sup> The "liability" incurred in this manner was also contingent—its further enforcement depended upon respondent's conduct. When, in 1965, the Commission sought enforcement of that order it was bringing an action for the enforcement of the liability arising out of the 1959 order, even though a condition of that enforcement was conduct in which respondent had engaged after 1959.

The court below erred in deeming the General Savings Statute inapplicable on the ground that the violation which was a necessary condition of the enforcement proceedings occurred after the passage of the Finality Act (R. 86). The fact that the conduct may have occurred at that time did not mean that the "liability [was] incurred" after 1959 within the meaning of the savings statute. As we have shown, the liability which was preserved when the Commission brought its enforcement proceeding was the pre-1959 liability incurred as a result of respondent's conduct or as a result of the entry of the cease-and-desist order against it. That liability, although conditional, was meaningful and legally cognizable, and the in-

<sup>22</sup> *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U.S. 845; *Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131 (C.A. 4); *National Labor Relations Board v. Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *National Labor Relations Board v. Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6).

terpretation of the court of appeals would have the effect of extinguishing it.

Moreover, the liability created by the order and the procedure for enforcing it are not separable, as the court of appeals assumed. In *De La Rama S.S. Co. v. United States*, 344 U.S. 386, this Court held under the General Savings Statute that outright repeal of the War Risk Insurance Act did not extinguish the government's pre-existing liability or deprive the district courts of jurisdiction to enforce that liability. "[T]o strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and tends to defeat rather than further the legislative purpose." 344 U.S. at 390. The decision below has done precisely that.

Finally, application of the General Savings Statute is not barred by Section 2 of the Finality Act, which provides that the old procedures are to apply in cases where judicial review proceedings have been initiated prior to the time of the enactment (p. 39, *infra*). Liabilities are not extinguished under the General Savings Statute "unless the repealing Act shall so expressly provide" (p. 40, *infra*). No express provision withdrawing the remedy appears in Section 2 or anywhere else in the Finality Act. Since the purpose of Section 2 was simply to indicate Congress' intent that the new procedures were to be prospective only (just as Section 5(a) of the Wheeler-Lea Act indicated that its procedures were to apply retrospectively), it would be unsound to read it as permitting the negative inference that pre-1959 procedures are unavailable in all

instances other than the narrow class which is specifically defined.

**CONCLUSION**

For the reasons stated the judgment of the court of appeals should be reversed and the case remanded to it for further proceedings on the Commission's petition for enforcement.

Respectfully submitted.

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## APPENDIX A

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (1958 ed.) 21 provided prior to July 23, 1959, as follows:

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such per-

son to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall file the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the application the court shall cause notice thereof to be served upon such person, and thereupon shall

have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission or Board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission or Board and thereupon the Commission or Board shall file in the court the record in the proceeding, as provided in section

2112 of Title 28. Upon the filing of such petition the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, determined as provided in section 1009(e) of Title 5, shall in like manner be conclusive.

Upon the filing of the record with it the jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise, relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

## APPENDIX B

The Finality Act of 1959, Public Law 86-107, 73 Stat. 243 [15 U.S.C. 21], provides:

### AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first and second paragraphs of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21), are hereby redesignated as subsections (a) and (b) of such section, respectively.*

(b) The last sentence of the second paragraph of such section which has been hereby redesignated as subsection (b) is amended to read as follows: "Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may

at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code.

Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancil-

lary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendent lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission

or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the anti-trust laws.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

"(g) Any order issued under subsection (b) shall become final—

"(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) upon the denial of a petition for certiorari, if the order of the commission or board

has been affirmed or the petition for review has been dismissed by the court of appeals; or

"(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

"(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3)

the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

## APPENDIX C

**The General Savings Statute, R.S. 13, as amended, 1 U.S.C. 109, provides:**

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

(40)

## APPENDIX D

### EXISTING CORPORATIONS AGAINST WHICH THERE ARE OUTSTANDING PRE-1959 CLAYTON ACT ORDERS

The following table lists the existing corporations which are named as respondents in outstanding pre-1959 Clayton Act orders. Not included in the list are corporations whose present existence could not be verified from standard reference works or those who were named in cases which were subsequently dismissed or in orders whose validity is dubious under current Clayton Act principles. Nor are corporations subject to Section 7 orders listed if divestiture was the only relief required in the order and such divestiture has already occurred.

Corporations marked "\*" have merged subsequent to the entry of the order.

FTC docket No.	Name of respondent	Con- sent proceed- ing	Section of Clay- ton Act	Date of order	Citation	Af- firmed	En- forced
4	A. B. Dick Co.		§ 2	5/26/17	1 FTC 20		
6	*Fleischmann Co.	X	§ 2, 3	4/18/18	1 FTC 119		
20	Cudahy Packing Co.		§ 2	7/31/18	1 FTC 199		
129	*Wayne Oil Tank & Pump Co.	X	§ 2	10/18/18	1 FTC 250		
504	Butterick Co., Inc.		§ 2	3/14/23	6 FTC 310	X	X
700	United States Steel Corp.	X	§ 2	7/21/24	8 FTC 1	X	X
781	*International Salt Co. of N.Y.	X	§ 2	6/26/22	5 FTC 67		
781	Morton Salt Co.	X	§ 2	6/26/22	5 FTC 67		
781	Diamond Crystal Salt Co.	X	§ 2	6/26/22	5 FTC 67		
781	Cutler Magnet Co.	X	§ 2	6/26/22	5 FTC 67		
781	Carry Salt Co.	X	§ 2	6/26/22	5 FTC 67		
781	Barton Salt Co.	X	§ 2	6/26/22	5 FTC 67		
1010	C. Ross Coal Co.		§ 2	3/19/25	8 FTC 450		
1010	Berwind Fuel Co.		§ 2	3/19/25	8 FTC 450		
1500	Penick & Ford, Ltd.	X	§ 3	11/17/30	14 FTC 261		
2000	Standard Brands, Inc.		§ 2	6/15/30	20 FTC 121; 30 FTC 1117; 35 FTC 1481	X	
2957	Anheuser-Busch, Inc.	X	§ 2	5/11/40	30 FTC 1209...		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
3151	Great Atlantic & Pacific Tea Co.		§ 2.	1/25/38	26 FTC 486	X	X
3152	Biddle Purchasing Co.		§ 2.	7/17/37	26 FTC 584	X	X
3153	General Grocer Co.		§ 2.	7/17/37	26 FTC 584	X	X
3155	W.D. Allen Mfg. Co.		§ 2.	12/31/37	26 FTC 200	X	X
3156	Virginia-Carolina Hardware Co.		§ 2.	12/31/37	26 FTC 200	X	X
3158	Elizabeth Arden Sales Corp.		§ 2.	10/3/44	36 FTC 288	X	X
3159	General Motors Corp.		§ 2.	11/12/41	34 FTC 88		
3154	Pittsburgh Plate Glass Co.	X	§ 2.	10/30/37	26 FTC 1228		
3154	Libbey-Owens-Ford Glass Co.	X	§ 2.	10/30/37	26 FTC 1228		
3154	Rolland Glass Co.	X	§ 2.	10/30/37	26 FTC 1228		
3154	Blackford Window Glass Co.	X	§ 2.	10/30/37	26 FTC 1228		
3167	Alpha Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Arkansas Cement Corp.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Ash Grove Lime & Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	California Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Coplay Cement Mfg. Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Giant Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Idaho Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Lone Star Cement Corp.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Keystone Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Kosmos Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Lehigh Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Marquette Cement Mfg. Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Medina Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Missouri Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Monarch Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Monolith Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Monolith Portland Midwest Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Nazareth Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Northwestern States Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Oklahoma Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Oregon Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Pittsburgh Plate Glass Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Southwestern Portland Cement Co.		§ 2.	7/17/43	37 FTC 87	X	X
3167	Whitehall Cement Mfg. Co.		§ 2.	7/17/43	37 FTC 87	X	X

FTC docket No.	Name of respondent	Con- sent proces- sing	Section of Clay- ton Act	Date of order	Citation	Af- firmed	En- forced
3214	J. Aron & Co., Inc.		\$ 2	10/20/38	27 FTC 1099	X	X
3214	Morton Salt Co.		\$ 2	10/20/38	27 FTC 1099	X	X
3218	Quality Bakers of Amer- ica Cooperative, Inc.		\$ 2	4/27/39	28 FTC 1507;	X	X
3218	Fireh Baking Co.		\$ 2	4/27/39	28 FTC 1507;	X	X
3218					29 FTC 1328.		
3218	Stroehmann Bros. Co.		\$ 2	4/27/39	28 FTC 1507;	X	X
3221	Bords Products Co.		\$ 2	11/13/41	34 FTC 87;		
3221	Dean Foods Co.		\$ 2	11/13/41	34 FTC 87;		
3221					43 FTC 619.		
3222	American Optical Co.	X	\$ 2	1/21/39	28 FTC 160		
3223	Bausch & Lomb, Inc.	X	\$ 2	1/21/39	28 FTC 186		
3223	White Haines Optical Co.	X	\$ 2	1/21/39	28 FTC 186		
3279	*Carter Carburetor Corp.		\$ 2	1/18/39	28 FTC 116		
3306	Nebraska Bridge Supply & Lumber Co.	X	\$ 2	7/13/38	27 FTC 377		X
3306	Rowe Mfg. Co.	X	\$ 2	7/13/38	27 FTC 377		
3306	Master Lock Co.	X	\$ 2	9/14/38	27 FTC 982		
3301	American Flange & Mfg. Co.	X	\$ 3	12/12/38	27 FTC 1286		
3604	Brunswick Corp.		\$ 3	12/7/42	35 FTC 736		
3607	National Biscuit Co.		\$ 3	1/17/39	28 FTC 99		
3633	Corn Products Co.		\$ 2, 3	3/16/42	34 FTC 850	X	
3633	Corn Products Sales Co.		\$ 2, 3	3/16/42	34 FTC 850	X	
3646	C. F. Sauer Co.	X	\$ 2	7/31/41	33 FTC 812		
3655	U.S. Rubber	X	\$ 2	4/25/39	28 FTC 1489		
3688	Signode Corp.		\$ 3	8/20/41	33 FTC 1049	X	X
3749	*Lambert Pharmaceutical Co.	X	\$ 2	8/12/40	31 FTC 734		
3765	Chase & Co.		\$ 2	12/22/39	30 FTC 224		
3798	Anheuser-Busch, Inc.		\$ 2	9/25/40	31 FTC 986		
3801	Hubinger Co.		\$ 2	4/ 3/41	32 FTC 1116		
3802	Penick & Ford, Ltd.	X	\$ 2	11/20/40	31 FTC 1404		
3803	A. E. Staley Mfg. Co.		\$ 2	6/14/42	34 FTC 1362	X	X
3804	Union Starch & Ref. Co.	X	\$ 2	12/11/40	32 FTC 60		
3804	Union Sales Corp.	X	\$ 2	12/11/40	32 FTC 60		
3805	American Maize-Products Co.	X	\$ 2	3/15/41	32 FTC 901		
3818	*Acme Steel Co.		\$ 3	8/20/41	33 FTC 1062		
3820	*A. S. Alice Co.		\$ 2	12/15/41	34 FTC 363		
3834	C. R. Anthony Co.	X	\$ 2	9/12/39	29 FTC 922; 30 FTC 1108.		
3840	Simmons Co.	X	\$ 2	8/25/39	29 FTC 727		
3843	American Oil Co.	X	\$ 2	9/ 9/39	29 FTC 857		
3843	General Finance, Inc.	X	\$ 2	9/ 9/39	29 FTC 857		
3844	Williams & Wilkins Co.	X	\$ 2	8/28/39	29 FTC 678		
3829	Walter Kidde & Co.	X	\$ 3	3/20/40	30 FTC 757		
3829	*American La France- Foamite Industries, Inc.	X	\$ 3	3/20/40	30 FTC 757		
3965	Sherwin-Williams Co.	X	\$ 2	1/ 8/43	36 FTC 25		
3965	*Lowe Brothers Co.	X	\$ 2	1/ 8/43	36 FTC 25		
3965	*John Lucas & Co.	X	\$ 2	1/ 8/43	36 FTC 25		
3977	Champion Spark Plug Co.		\$ 2, 3	7/10/33	50 FTC 30		
4110	Milford Rivet & Machine Co.		\$ 3	2/ 9/44	38 FTC 180		

FTC decision No.	Name of respondent	Con- sent proceed- ing	Section of Clayton Act	Date of order	Citation	Ad- judged	Re- ferred
4111	Judson L. Thomson Mfg. Co.	X	§ 3	2/ 9/44	38 FTC 135	X	X
4143	Blaney & Smith, Inc.	X	§ 2	12/31/40	32 FTC 315	X	X
4275	A. W. Sisk & Son	X	§ 2	11/30/40	31 FTC 1543		
4281	General Grocer Co.	X	§ 2	6/27/41	32 FTC 377		
4307	International Salt Co.	X	§ 2	8/22/42	40 FTC 136		
4307	Independent Salt Co.	X	§ 2	8/22/42	40 FTC 136		
4307	Eastern Salt Co.	X	§ 2	8/22/42	40 FTC 136		
4319	Morton Salt Co.	X	§ 2	7/28/44	39 FTC 53; 40 FTC 328; 45 FTC 326	X	X
4344	Vonnegut Hardware Co.	X	§ 2	1/23/41	32 FTC 512		
4356	Seaboard Packing Co.	X	§ 2	4/14/41	32 FTC 1192		
4428	Arkansas State Rice Mill- ing Co.	X	§ 2	8/21/41	32 FTC 1114		
4548	E. J. Brash & Sons	X	§ 2	12/21/44	39 FTC 535		
4550-54	Edwin B. Simpson Co.	X	§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 159; 38 FTC 106		
4550-54	National Rivet & Mfg. Co.	X	§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 159; 38 FTC 106		
4550-54	Chicago Rivet & Machine Co.	X	§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 159; 38 FTC 106		
4671	*Life Savers Corp.	X	§ 2, 2(a), 2(d)	12/23/41	34 FTC 475		
4695	American Agricultural Chemical Co.	X	§ 2	3/25/46	42 FTC 114		
4780	Nash-Finch Co.	X	§ 2	1/ 6/47	43 FTC 297		
4778	Curtiss Candy Co.	X	§ 2	11/12/47	44 FTC 297; 43 FTC 181		
4677	Walter H. Johnson Candy Co.	X	§ 2	6/11/48	44 FTC 1021		
5015	Dentists Supply Co. of New York	X	§ 2	8/17/48	37 FTC 345		
4930	Honeywell, Inc.	X	§ 3	1/14/48	44 FTC 351	X	X
4933	Automatic Canteen Co. of America	X	§ 3	6/ 6/50	46 FTC 561; 51 FTC 574	X	X
4672	U.S. Rubber Co.	X	§ 2	6/30/50	46 FTC 565		
5018	National Biscuit Co.	X	§ 2	2/23/44	36 FTC 218; 50 FTC 932		
5017	Buberoid Co.	X	§ 2	1/20/50	46 FTC 570	X	
5027	Associated Merchandising Corp.	X	§ 2	5/ 8/45	40 FTC 575		
5027	L. S. Ayres & Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	Dayton Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	Emporium-Capwell Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	B. Ferman Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	Joseph Horne Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	J. L. Hudson Co.	X	§ 2	5/ 8/45	40 FTC 575		
5027	Hinüber Bros. Co.	X	§ 2	5/ 8/45	40 FTC 575		

FTC Docket No.	Name of respondent	Com- plaint presented to	Section of Clay- ton Act	Date of order	Citation	Ad- mitted	Decided
5027	Strawbridge & Clothier	X	§ 2	5/8/45	40 FTC 578		
5027	Thalhimer Bros., Inc.	X	§ 2	5/8/45	40 FTC 578		
5049	American Art Clay Co.	X	§ 2	5/18/44	38 FTC 423		
5116	General Baking Co.	X	§ 2	4/28/44	38 FTC 307		
5172	John B. Sanborn Co.	X	§ 2	10/8/45	41 FTC 244		
5233	National Lead Co.		§ 2	1/12/38	40 FTC 791		
5258	Sherwin-Williams Co.		§ 2	1/12/38	40 FTC 791		
5258	Gillette Co.		§ 2	1/12/38	40 FTC 791	X	
5258	Eagle-Picher Co.		§ 2	1/12/38	40 FTC 791	X	
5279	Whitney & Co.		§ 2	3/26/46	42 FTC 138	X	
5284	Parrott & Co.	X	§ 2	3/26/46	42 FTC 138		
5326	Arnold Comptable Corp.	X	§ 2	2/3/50	46 FTC 404		
5326	Auerbach Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Fowler, Dick, and Walker	X	§ 2	2/3/50	46 FTC 404		
5326	Hecht Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Popular Dry Goods Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Ames & Brownley, Inc.	X	§ 2	2/3/50	46 FTC 404		
5326	King's, Inc.	X	§ 2	2/3/50	46 FTC 404		
5326	Ogus Habrovnich & Ogus, Inc.	X	§ 2	2/3/50	46 FTC 404		
5404	Wilbur-Ellis Co.	X	§ 2	9/22/46	43 FTC 164		
5423	Stokely-Van Camp, Inc.		§ 2	3/7/52	48 FTC 894		
5423	Dean Foods Co.		§ 2	3/7/52	48 FTC 894		
5423	Fleming Co.		§ 2	3/7/52	48 FTC 894		
5423	Haas Bros.		§ 2	3/7/52	48 FTC 894		
5423	Utah Wholesale Grocery Co.		§ 2	3/7/52	48 FTC 894		
5423	Roundup Grocery Co.		§ 2	3/7/52	48 FTC 894		
5423	Inter-State Grocer Co.		§ 2	3/7/52	48 FTC 894		
5423	Milliken Tomlinson Co.		§ 2	3/7/52	48 FTC 894		
5423	Holbrook Grocery Co.		§ 2	3/7/52	48 FTC 894		
5423	McLain Grocery Co.		§ 2	3/7/52	48 FTC 894		
5426	Draper Corp.	X	§ 2, 3	5/5/47	43 FTC 480		
5462	California Marine Cur- ing & Packing Co.	X	§ 2	2/12/47	43 FTC 304		
5469	Hunt Foods & Industries, Inc.		§ 2	8/11/48	45 FTC 145		
5471	New England Fish Co.	X	§ 2	1/12/48	44 FTC 340		
5482	District Grocery Stores, Inc.		§ 2	12/13/51	48 FTC 581		
5502	Corn Products Co.		§ 2	11/20/50	47 FTC 587		
5502	Corn Products Sales Co.		§ 2	11/20/50	47 FTC 587		
5502	A. E. Staley Mfg. Co.		§ 2	11/20/50	47 FTC 587		
5502	Penick & Ford, Ltd.		§ 2	11/20/50	47 FTC 587		
5502	American Maize-Products Co.		§ 2	11/20/50	47 FTC 587		
5502	Anheuser-Busch, Inc.		§ 2	11/20/50	47 FTC 587		
5502	Hubinger Co.		§ 2	11/20/50	47 FTC 587		
5502	National Starch & Chem- ical Corp.		§ 2	11/20/50	47 FTC 587		
5502	Union Starch & Ref. Co.		§ 2	11/20/50	47 FTC 587		
5502	Union Sales Corp.		§ 2	11/20/50	47 FTC 587		
5534	Bonner Packing Co.	X	§ 2	11/9/50	47 FTC 587		
5576	J. Richard Phillips & Sons, Inc.		§ 2	2/6/50	46 FTC 467		
5576	H. P. Cannon & Son, Inc.		§ 2	2/6/50	46 FTC 467		
5620	General Motors Corp.		§ 2, 3	7/10/53	50 FTC 54		
5623	Larsen Co.		§ 2	2/6/50	46 FTC 467		

FTC Docket No.	Name of respondent	Con- sent proceed- ing	Section of Clay- ton Act	Date of order	Citation	Ad- mitted	Ver- dicted
5624	Electric Auto-Lite Co.	§ 2.	7/10/58	50 FTC 73			
5640	Florida Citrus Canners Cooperative.	§ 2.	7/14/52	49 FTC 37			
5648	National Tea Co.	§ 2.	5/15/50	46 FTC 829; 47 FTC 1314.			
5655	Dictograph Corp.	§ 3.	9/24/53	50 FTC 281			
5670	Ideal Cement Co.	X	§ 2.	9/28/50	47 FTC 221- 1030.	X	
5671	Monolith Portland Ce- ment Co.	§ 2.	5/4/51	47 FTC 1292			
5671	Monolith Portland Mid- west Co.	§ 2.	5/4/51	47 FTC 1292			
5685	Revlon, Inc.	§ 3.	9/23/54	51 FTC 280; 51 FTC 466			
5696	Central Soya Co.	§ 2.	1/11/51	47 FTC 839			
5698	Harley-Davidson Motor Co.	§ 3.	6/29/54	50 FTC 1047			
5701	Horlicks Corp.	§ 3.	9/19/50	47 FTC 169			
5721	Standard Motor Prod- ucts, Inc.	§ 2.	12/27/57	50 FTC 624; 54 FTC 814.	X		
5722	Whitaker Cable Corp.	§ 2.	4/29/55	51 FTC 958			
5723	Moog Industries, Inc.	§ 2.	4/29/55	51 FTC 931			
5766	Corpus Christi Hardware Co.	§ 2.	1/24/50	50 FTC 932; 55 FTC 1279.			
5766	Keith-Simmons Co.	§ 2.	1/24/50	50 FTC 932; 55 FTC 1279.	X		
5766	Mills-Morris Co.	§ 2.	1/24/50	50 FTC 932; 55 FTC 1279.	X		
5766	Robinson Bros.	§ 2.	1/24/50	50 FTC 932			
5766	Williams Hardware Co.	§ 2.	1/24/50	50 FTC 932; 55 FTC 1279.	X		
5768	C. E. Niehoff & Co.	§ 2.	5/17/55	51 FTC 1114			
5769	Federal-Mogul-Bower Bearings, Inc.	X	§ 2.	6/ 9/58	54 FTC 1628		
5770	E. Edelmann & Co.	§ 2.	4/29/55	51 FTC 978; 55 FTC 1288.			
5771	Namco, Inc.	§ 2.	3/17/53	49 FTC 1161			
5773	*Appleton-Century- Crotts, Inc.	§ 2.	6/13/51	47 FTC 1371			
5794	Standard Oil Co. (Ohio)	X	§ 2.	7/19/51	48 FTC 53		
5794	Standard Oil Co. of Cal.	X	§ 2.	7/19/51	48 FTC 53		
5794	Standard Oil Co. (Indiana)	X	§ 2.	7/19/51	48 FTC 53		
5794	Standard Oil Co. (N.J.)	X	§ 2.	7/19/51	48 FTC 53		
5797	Underwood Corp.	§ 3.	3/ 2/58	49 FTC 1128			
5819	Pacific Gamble Robinson Co.	§ 2.	4/12/51	47 FTC 1202	X		
5822	Maico Electronics, Inc.	X	§ 3.	6/ 3/55	50 FTC 485		
5828	Holtite Mfg. Co.	§ 2.	10/30/53	50 FTC 379			
5836	Gruen Industries, Inc.	§ 2.	3/14/52	48 FTC 970			
5837	Elgin National Watch Co.	§ 2.	3/14/52	48 FTC 990			
5865	Consolidated Cigar Corp.	§ 2.	7/7/51	48 ETC 3			
5872	Thompson Products, Inc.	§ 2.	2/19/59	55 FTC 1282			
5879	Consolidated Companies Inc.	§ 2.	8/31/51	48 FTC 254			
5883	Outboard Marine Corp.	§ 3, 11.	6/27/58	52 FTC 1553			

FTC docket No.	Name of respondent	Con- sent proceed- ing	Section of Clay- ton Act	Date of order	Citation	Al- firmed	En- forced
5897	Doubleday & Co.		§ 2.	8/31/52	50 FTC 262;		
5898	*Harper & Brothers	X	§ 2.	3/22/52	52 FTC 169.		
5921	Hastings Potato Growers Ass'n.	X	§ 2.	3/6/52	52 FTC 1017		
5960	Houghton Mifflin Co.	X	§ 2.	8/12/52	48 FTC 261		
5961	Little, Brown & Co.	X	§ 2.	3/13/52	48 FTC 260		
5962	Random House, Inc.	X	§ 2.	3/13/52	48 FTC 278		
5963	Simon & Schuster, Inc.	X	§ 2.	3/13/52	48 FTC 280		
5965	Anchor Serum Co.		§ 3.	2/16/52	50 FTC 631		
5969	Banrus Watch Co.	X	§ 2.	11/6/52	49 FTC 476	X	X
5971	Kentucky Chemical In- dustries, Inc.	X	§ 2.	8/6/52	49 FTC 57		
5973	Early & Daniel Co.	X	§ 2.	8/6/52	49 FTC 108		
5974	Page Dairy Co.		§ 2.	10/20/52	50 FTC 308		
5982	American Greetings Corp.		§ 2.	10/28/52	49 FTC 440		
5989	Fruitvale Canning Co.		§ 2.	6/15/52	50 FTC 177;		
					52 FTC 1504.		
6018	General Foods Corp.		§ 2.	2/15/52	52 FTC 708		
6039	Western Grain Co.	X	§ 2.	1/27/52	49 FTC 928		
6042	American Biltrite Rub- ber Co.	X	§ 2.	8/17/52	50 FTC 133		
6043	B.F. Goodrich Co.	X	§ 2.	8/17/52	50 FTC 128		
6044	Goodyear Tire & Rubber Co.	X	§ 2.	8/17/52	50 FTC 143		
6045	O'Sullivan Rubber Corp.	X	§ 2.	8/17/52	50 FTC 149		
6051	Shell Oil Co.	X	§ 3.	3/17/52	49 FTC 1122		
6061	Jacobs Mfg. Co.	X	§ 2.	6/24/52	49 FTC 1463		
6160	Topco Associates, Inc.	X	§ 2.	8/17/52	51 FTC 83		
6191	Sunshine Biscuits, Inc.	X	§ 2.	7/20/52	51 FTC 25.		
					7/29/52		
6198	Frank F. Taylor Co.		§ 2.	6/20/52	51 FTC 51		
6215	Jonathan Logan, Inc.	X	§ 2.	8/29/52	51 FTC 1229		
6221	Simplicity Pattern Co.		§ 2.	3/13/52	53 FTC 771	X	
6255	Florida Citrus Exchange, Inc.		§ 2.	11/26/52	53 FTC 493		
6334	Cross Baking Co., Inc.	X	§ 3.	6/24/52	52 FTC 54		
6352	Callaway Milk Co.	X	§ 3.	12/8/52	52 FTC 564		
6386	Union Malleable Mfg. Co.	X	§ 2.	9/23/52	52 FTC 408		
6388	American Brake Shoe Co.	X	§ 2.	11/15/52	52 FTC 484		
6391	Union Bag-Camp Paper Corp.	X	§ 7.	8/10/52	52 FTC 1278		
6420	Brunswig Drug Co.	X	§ 2.	1/17/52	52 FTC 699		
6420	Durr Drug Co.	X	§ 2.	1/17/52	52 FTC 699		
6420	Gilmair Bros., Inc.	X	§ 2.	1/17/52	52 FTC 699		
6420	Kaufman-Lattimer Co.	X	§ 2.	1/17/52	52 FTC 699		
6420	Kiefer Stewart Co.	X	§ 2.	1/17/52	52 FTC 699		
6420	McPike, Inc.	X	§ 2.	1/17/52	52 FTC 699		
6420	Owens, Minor & Bodeker, Inc.	X	§ 2.	1/17/52	52 FTC 699		
6420	Scott Drug Co.	X	§ 2.	1/17/52	52 FTC 699		
6420	Smith, Kline & French, Inc.	X	§ 2.	1/17/52	52 FTC 699		
6420	Southwestern Drug Corp.	X	§ 2.	1/17/52	52 FTC 699		
6440	*Hudnut Sales Co., Inc.	X	§ 2.	4/4/52	52 FTC 1064		
6441	Helena Rubinstein, Inc.	X	§ 2.	8/9/52	52 FTC 1267		
6442	Yardley of London, Inc.	X	§ 2.	4/19/52	52 FTC 1086		

FTC Case No.	Name of respondent	Com- plaint proceed- ing	Section of Clay- ton Act	Date of order	Citation	Af- firmed	En- forced
6444	Fox Grocery Co.	X	§ 2.	4/24/56	52 FTC 1140		
6444	Consolidated Foods Corp.	X	§ 2.	4/24/56	52 FTC 1140		
6444	Standard Wholesale Co.	X	§ 2.	4/24/56	52 FTC 1140		
6444	Waples-Pinett Co.	X	§ 2.	4/24/56	52 FTC 1140		
6451	Reed Candy Co.	X	§ 2.	1/26/56	54 FTC 239	X	
6452	*Tetley Tea Co. Inc.	X	§ 2.	4/26/56	52 FTC 1181		
6453	*Crosse & Blackwell Co.		§ 2.	5/2/56	52 FTC 1014;		
					54 FTC 1569;		
					54 FTC 1574		
6455	*Minute Maid Corp.	X	§ 2.	7/27/56	53 FTC 54		
6457	J. H. Filbert, Inc.		§ 2.	9/19/57	54 FTC 339		
6458	Pompeian Olive Oil Corp.	X	§ 2.	9/20/57	52 FTC 1014; X	X	
					54 FTC 374		
6470	McCormick & Co.	X	§ 2.	9/20/57	54 FTC 335	X	X
6480	Thomas Y. Crowell Co.	X	§ 2.	3/6/58	52 FTC 919		
6519	Revlon, Inc.	X	§ 2.	8/17/58	53 FTC 127		
6523	Johnson & Johnson	X	§ 2.	9/27/58	53 FTC 264		
6527	Scoville Mfg. Co.	X	§ 7.	9/14/58	53 FTC 260		
6592	Greveton Papers Co.		§ 2.	8/7/58	54 FTC 1490		
6595	Bunkist Growers, Inc.	X	§ 2.	8/7/58	54 FTC 1574		
6596	General Foods Corp.		§ 2.	8/7/58	54 FTC 1502	X	
6597	General Biscuits, Inc.		§ 2.	8/7/58	54 FTC 1514;		
					55 FTC 2044		
6598	Piel Bros., Inc.		§ 2.	8/7/58	54 FTC 1526		
6599	Hudson Pulp & Paper Corp.		§ 2.	8/7/58	54 FTC 1538		
6600	P. Lorillard Co.		§ 2.	5/7/58	54 FTC 1550	X	
6624	Otarion, Inc.	X	§ 3.	3/14/57	53 FTC 780		
6633	Wakatun Food Corp.	X	§ 2.	3/22/57	53 FTC 783		
6633	Twin County Grocers, Inc.	X	§ 2.	3/22/57	53 FTC 783		
6653	Bourjois, Inc.	X	§ 2.	3/5/57	53 FTC 751		
6646	Vendo Co.		§ 7.	9/6/57	53 FTC 1286;		
					54 FTC 233		
6654	Sealed Power Corp.	X	§ 2.	5/3/57	53 FTC 970		
6673	Culligan, Inc.	X	§ 3.	5/29/57	53 FTC 1072		
6696	Shell Oil Co.	X	§ 2.	4/2/58	54 FTC 1274		
6699	Pittsburgh Plate Glass Co.	X	§ 2.	4/19/57	53 FTC 902		
6700	Libbey-Owens-Ford Glass Co.	X	§ 2.	5/22/57	53 FTC 1088		
6701	Sperry Rand Corp.	X	§ 2.	11/3/58	53 FTC 655;		
					56 FTC 1634.		
6737	Borden Co.	X	§ 2.	11/12/57	54 FTC 563		
6747	Topps Chewing Gum, Inc.	X	§ 2.	10/25/57	54 FTC 475		
6749	Leaf Brands, Inc.	X	§ 2.	9/13/57	54 FTC 221		
6764	Eis Automotive Corp.		§ 2.	3/20/58	55 FTC 1473		
6765	Auto Electric Service Corp.		§ 2.	12/23/58	55 FTC 910		
6766	Amalgamated Sugar Co.	X	§ 2.	1/21/58	54 FTC 943		
6816	*Airtex Products, Inc.	X	§ 2.	5/12/58	55 FTC 1754		
6820	Automatic Canteen Co. of America	X	§ 7.	6/28/58	54 FTC 1831		
6833	Ward Foods Co.	X	§ 2.	2/10/59	56 FTC 1919;		
					55 FTC 1142.		
6877	Allen V. Smith, Inc.	X	§ 2.	1/22/58	54 FTC 907		
6890	Allbright's		§ 2.	3/27/59	55 FTC 1556		

FTC docket No.	Name of respondent	Complaint proceeding	Section of Clayton Act	Date of order	Citation	Approved	Enforced
6601	Neapco Products, Inc.	X	§ 2....	11/24/58	55 FTC 708		
6602	Shick Electric, Inc.	X	§ 2....	11/ 3/58	55 FTC 665		
6603	North American Philips Co.	X	§ 2....	10/30/58	55 FTC 672		
6610	Food Mart, Inc.	X	§ 2....	4/ 4/59	55 FTC 1641		
6619	Dan Dee Pretzel & Potato Chip Co.	X	§ 2....	6/27/58	54 FTC 1855		
6642	DeMing & Gould Co.	X	§ 2....	8/12/58	54 FTC 1804		
7021	Ward's Cove Packing Co.	X	§ 2....	7/ 3/58	55 FTC 49		
7032	*Thermoid Co.	X	§ 2....	10/ 3/58	55 FTC 518		
7066	Ronson Corp.	X	§ 2....	1/ 8/59	55 FTC 1017		
7072	William Freihofer Baking Co.	X	§ 2....	1/ 7/59	55 FTC 903		
7090	Maguire Industries, Inc.	X	§ 2....	9/11/58	55 FTC 306		
7117	Longines-Wittnauer Watch Co.	X	§ 2....	11/14/58	55 FTC 731		
7117	Associated Barr Stores, Inc.	X	§ 2....	11/14/58	55 FTC 731		
7119	Trifari, Krusman & Fisher, Inc.	X	§ 2....	9/23/58	55 FTC 307		
7119	Associated Barr Stores, Inc.	X	§ 2....	9/23/58	55 FTC 307		
7141	Firestone Tire & Rubber Co.		§ 2....	5/12/59	55 FTC 171		
7142	Automotive Supply Co.	X	§ 2....	8/29/58	55 FTC 192		
7142	Central Warehouse Co.	X	§ 2....	8/29/58	55 FTC 192		
7210	*Point Adams Packing Co.	X	§ 2....	12/ 5/58	55 FTC 852		
7215	Hudson House, Inc.	X	§ 2....	2/12/59	55 FTC 1226		
7230	Frito-Lay, Inc.	X	§ 2....	3/10/59	55 FTC 1416		
7230	International Basic Economy Corp.	X	§ 2....	3/10/59	55 FTC 1416		
7243	Market Forge Co.	X	§ 2....	3/27/59	55 FTC 1578		
7247	Jantzen, Inc.	X	§ 2....	1/16/59	55 FTC 1035		
7265	Alton Canning Co.	X	§ 2....	6/ 1/59	55 FTC 1001		
7317	Sav-A-Stop, Inc.	X	§ 2....	5/19/59	55 FTC 1807		
7447	Pangburn Co.	X	§ 2....	7/15/59	55 FTC 57		

## APPENDIX E

The following is the full text of S. Rep. No. 83, 86th Cong., 1st Sess., exclusive of the text of the statute and communications to the Senate Committee from the various administrative agencies:

SENATE

86TH CONGRESS, 1ST SESSION

CALENDAR No. 76

REPORT No. 83

### MAKING CLAYTON ACT ORDERS FINAL

MARCH 5, 1959.—Ordered to be printed

Mr. KEFAUVER, from the Committee on the Judiciary, submitted the following:

REPORT

[To accompany S. 726]

The Committee on the Judiciary, to which was referred the bill (S. 726) to amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

## AMENDMENTS

1. On page 2, commencing with the letter "A" on line 8, strike all down to and including "script" on line 18 and insert in lieu thereof the following:

A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record and shall have power to make and enter.

2. On page 3, line 22, following "(d)", strike the word "The" and insert in lieu thereof the following: "Upon the filing of the record with it the".

3. On page 4, line 3, after the word "of", insert the word "the".

## PURPOSE OF AMENDMENTS

Amendments Nos. 1 and 2 are technical in nature, their purpose being to conform the language in this bill in the act of August 28, 1958, which authorized abbreviated records in reviewing administrative agency proceedings.

The purpose of amendment No. 3 is to correct a typographical error.

## PURPOSE

The purpose of the proposed legislation, as amended, is to provide that orders issued by the

Federal Trade Commission and other agencies under section 11 of the Clayton Act shall become final in the same manner in which orders issued by the Federal Trade Commission under section 5 of the Federal Trade Commission Act become final.

#### STATEMENT

Public hearings were conducted by the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on a similar proposal of the 85th Congress (S. 721) and other legislation on April 1, 2, 24, and 25, 1958, and during the course of these public hearings the Honorable John W. Gwynne, Chairman, Federal Trade Commission, as well as Robert A. Bicks, assistant to the Assistant Attorney General in charge of the Antitrust Division, testified in support of the proposed legislation. For this reason the subcommittee did not hold additional hearings during the 1st session of the 86th Congress.

The effectiveness of the Clayton Act, as amended by the Robinson-Patman Act, has long been handicapped by the absence of adequate enforcement provisions. Existing procedures are laborious, time consuming, and very expensive. The Federal Trade Commission must investigate and, after complaint, prove, on the record, violations of the act before a cease-and-desist order may be issued. After the order to cease and desist has been issued, the Commission must again investigate and again prove violations of the order and of the act before the Commission can obtain a court order commanding obedience to the Commission's

order to cease and desist. Upon such proof, the court enforces the Commission's order. Only then, if the respondent violates the act a third time, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law. At the present time, more than 80 outstanding Clayton Act cease-and-desist orders are under active study at the Commission to determine whether or not respondents are in compliance. This figure includes 17 cases which have been assigned for field investigation, 12 where the results of field investigation are being reviewed, and 6 cases which have been assigned for investigational hearings.

S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years. The Federal Trade Commission has sought this type of legislation for more than 20 years, but the need for the amendatory legislation became even more pressing in 1952 when the Supreme Court decided *Federal Trade Commission v. Ruberoid* (343 U.S. 470). Prior to that decision, the Commission had been able to proceed for enforcement of Clayton Act orders by cross-petition in cases where respondents had petitioned for review in the U.S. courts of appeals. In Ruberoid, the Supreme Court held that the courts are without authority to issue an order commanding obedience to an order of the Commission under the Clayton Act until the Com-

mission had established violations of its order. Commenting on this holding, Justice Jackson stated in dissent:

I see no real sense, when the case is already before the court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt (343 U.S. 470, 494).

Judge Gwynne, in testifying in favor of this legislation on behalf of the Federal Trade Commission, stated that it is clear that the Clayton Act, as amended by the Robinson-Patman Act, would be more effectively administered and would be of much greater value as a deterrent if amended as proposed by S. 726.

The Board of Governors of the Federal Reserve System has advised the committee that it favors the general objective embodied in S. 726, and that Board stated:

That the proposed enforcement procedures would be more expeditious than the present procedure without adversely affecting the rights and safeguards to which respondents in Clayton Act proceedings are entitled.

The Interstate Commerce Commission, in reporting its views on this proposed legislation to the committee, stated that, while suggesting two clarifying amendments, it was of the opinion that the proposed changes which the bill would make in the Clayton Act to conform it to the Federal Trade Commission Act would expedite the enforcement of agency orders and, therefore, appear to be desirable in the public interest.

The Civil Aeronautics Board, in reporting to this committee, was of the opinion that that agency would welcome the opportunity to support legislation designed to accomplish the finalization of Clayton Act orders.

The Federal Communications Commission stated that the bill—

will aid all commissions and boards affected thereby. This Commission, therefore, endorses the proposed legislation.

The committee hopes that the agencies affected by this proposed legislation will continue their efforts to issue orders which are as definitive as possible.

The committee is in agreement with the expressions of views favoring this legislation offered to the committee by the various interested agencies. The committee believes that this legislation will strengthen the enforcement provisions of section 11 of the Clayton Act and, accordingly, recommends favorable consideration of S. 726, as amended.

Attached hereto and made a part hereof are the reports submitted by the Interstate Commerce Commission, Federal Reserve Board, the Civil Aeronautics Board, and the Federal Communications Commission on S. 721 of the 85th Congress.